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El potencial cosmopolita de Vitoria hecho realidad: La naturaleza humana y los derechos humanos a través de la construcción social, no del derecho natural

Benjamin Gregg

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La naturaleza humana y los derechos humanos a través
de la construcción social, no del derecho natural

Benjamin Gregg 

University of Texas at Austin (EEUU)

bgregg@austin.utexas.edu

ORCID: <https://orcid.org/0000-0001-9510-6147>

<https://doi.org/10.18543/djhr.2830>

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Summary: Introduction. 1. Overview of the argument. 2. Situating the argument within the existing scholarly literature. 3. Inequalities with respect to rights to territorial sovereignty and self-defense. 4. Vitoria's abiding cosmopolitan potential released: first step. 5. Inequalities with respect to self-determination and self-government. 6. Vitoria's abiding cosmopolitan potential released: second step. 7. Inequality with regard to indigenous freedom of conscience in the face of Christian proselytization. 8. Vitoria's abiding cosmopolitan potential released: third step. Conclusion: Realizing a sixteenth century cosmopolitan intuition for indigenous peoples today. References.

Abstract: Vitoria's 1537 lecture *On the American Indians* asserts moral equality and fundamental rights for all humans but is contradicted by the significant inequalities between Spanish conquistadores and indigenous peoples of Mexico and Peru. Despite recognizing these rights, Vitoria's vision supports an unequal Euro-American relationship regarding territorial sovereignty, self-defense, self-determination, and religious freedom. His insights have implications for contemporary international law concerning indigenous rights. However, his theological framework limits this potential. To

better address indigenous issues today, I advocate reframing Vitoria's perspective by replacing his natural law-based human-rights essentialism with a naturalistic approach that views human rights as social constructs. This shift can help develop international law to prevent violent interactions and promote equality between indigenous and non-indigenous peoples, reducing reliance on nation states to safeguard indigenous rights.

Keywords: Vitoria, indigenous peoples of the Americas, human rights, human nature, cosmopolitanism

Resumen: La conferencia de Vitoria de 1537 *Sobre los indios americanos* afirma la igualdad moral y los derechos fundamentales de todos los seres humanos, pero se contradice con las importantes desigualdades entre los conquistadores españoles y los pueblos indígenas de México y Perú. A pesar de reconocer estos derechos, la visión de Vitoria apoya una relación euroamericana desigual en lo que respecta a la soberanía territorial, la autodefensa, la autodeterminación y la libertad religiosa. Sus ideas tienen implicaciones para el derecho internacional contemporáneo relativo a los derechos indígenas. Sin embargo, su marco teológico limita este potencial. Para abordar mejor las cuestiones indígenas en la actualidad, abogo por replantear la perspectiva de Vitoria sustituyendo su esencialismo de los derechos humanos basado en el derecho natural por un enfoque naturalista que considere los derechos humanos como construcciones sociales. Este cambio puede ayudar a desarrollar el derecho internacional para prevenir interacciones violentas y promover la igualdad entre pueblos indígenas y no indígenas, reduciendo la dependencia de los Estados nación para salvaguardar los derechos indígenas.

Palabras clave: Vitoria, pueblos indígenas de América, derechos humanos, naturaleza humana, cosmopolitismo.

Introduction

The Spanish conquests of Mexico (1520-1522) and Peru (1530-1531) destroyed local economies, forcefully integrated local populations into colonial economies and exploited their labor, plundered natural resources, ravaged indigenous political and cultural communities through coercive proselytization, and led to what some historians describe as genocide.¹ In Spain, reports of the conquests stimulated intense debate among elites about Spanish behavior. A prominent participant was the Dominican philosopher, theologian, and jurist Francisco de Arcaya y Compludo, called de Vitoria (1483-1546). In the academic year 1537-1538 –only fifty years after Spanish authorities expelled centuries-old Muslim and Jewish communities from the Iberian Peninsula and Columbus disembarked in the West Indies– Vitoria delivered a public lecture (*relectio*) at the University of Salamanca. Titled *De Indis (On the American Indians)*,² in several of its major arguments it betrays –and is betrayed by– deep and abiding tensions between a nascent modern cosmopolitanism and a theological parochialism.

By *cosmopolitanism*, I refer to Vitoria's assertion, radical for the 16th century, that all human beings are morally equal and should equally enjoy certain fundamental rights, regardless of faith, culture, and political culture (thereby anticipating international law and human rights, which I discuss below). Today the term *cosmopolitanism* generally revolves around the notion that all human beings, regardless of political affiliation and other descriptors, can and should be citizens of some kind of imagined, single community. Different conceptions of community generate different versions of cosmopolitanism, with emphases ranging from political institutions, to moral communities, to common markets, to shared cultural self-understandings or historical fates. Most versions discount special obligations to some persons –compatriots or other limited communities– for an equal obligation to all persons, at least

¹ According to Ostler (2015, 1), "disagreements about the pervasiveness of genocide in the history of the post-Columbian Western Hemisphere [...] pivot on definitions of genocide." Politically conservative approaches focus on "intentional actions and policies of governments that result in very large population losses, usually from direct killing," while politically liberal approaches focus "more on outcomes" and call for "less stringent criteria for intent."

² Published posthumously in 1557 in Lyon, France from notes transcribed by students who had attended the lecture (in fact, a series of lectures that I will refer to in the singular, as a unity). By then, Spain's Charles V had banned the printing and dissemination in Spain of all of Vitoria's *relectiones*.

morally. My analysis of Vitoria uncovers a moral –and ideally legal– obligation of each people to all other peoples, regardless of their local attachments, whether political, cultural, religious, ethnic, or economic.

By *parochialism*, I refer to Vitoria's invocation of a thin, formal equality belied by the significant material and power-based inequalities of invader and invaded. I focus on these three inequalities because they are prominent in Vitoria's lecture and they are the barriers internal to (but excisable from) Vitoria's thought to realizing the hidden cosmopolitan potential of Vitoria's lecture. I argue that Vitoria undermines that potential because his theological, natural-law approach –the standard for the School of Salamanca and elsewhere in early Renaissance Europe – “essentializes” the relevant distinctions. (*Essentializes* means: it makes these distinctions appear necessary and permanent.) But the cosmopolitan in Vitoria knows that they are neither permanent nor unavoidable, that they are in fact social constructs, hence contingent, not essential.

By *parochialism*, I refer as well to local attachments that inform his thought: to sixteenth century European culture, to the Spanish Crown, and above all to his confessional tradition and its institutions.

1. Overview of the argument

In six steps, I displace Vitoria's natural law-based defense of indigenous humanity with socially constructed notions of human nature and human rights that escape parochialism. I do so with respect to the unequal dimensions of the European/indigenous relationship that emerged from the multiple contexts of Spanish conquest in the Americas –contexts legal, political, economic, military, and cultural. (1) I begin with inequalities between the Europeans and the Amerindians with respect to rights to territorial sovereignty and self-defense. (2) I uncover the cosmopolitan potential in Vitoria's lecture by displacing his theological natural law basis with social construction. (3) I analyze inequalities between the Spanish and the indigenous peoples with respect to self-determination and self-government and then (4) identify further cosmopolitan potential in Vitoria's thought: an incipient notion of reasoned argument between interlocutors open to persuasion by the better argument. (5) I turn then to inequality with regard to indigenous freedom of conscience in the face of Christian proselytization and (6) conclude by exposing cosmopolitan potential in Vitoria's nascent notion of equality and reciprocity between Europeans and Amerindians. I show that this potential renders Vitoria directly

useful to improving international law today in ways that further the interests of all the world's indigenous peoples not only in the Americas but globally.

2. Situating the argument within the existing scholarly literature

I focus on freeing Vitoria's cosmopolitan potential. To situate this focus within the broad landscape of scholarship on Vitoria's treatment of the Amerindians, I show where my work builds on the work of others, and then where it rejects the work of others.

Although novel, my approach draws from several strands in the extant literature. First, my proposal for abandoning Vitoria's theological basis finds support in Bain's (2013, 591, 610) argument. Bain contends that Vitoria's defense of the Amerindians as innocents "cannot be abstracted from his theology and remain intelligible." After all, Vitoria's defense "presupposes a rationally ordered Christian universe" that is "premised on a hierarchy of goods, intelligible in relations of subordination and superordination, which culminates in God and is governed by God." Hence, Vitoria's defense, if abstracted from this context, loses its "illocutionary force."

Second, Altwicker (2020, 8) notes how Vitoria's allowance of violent conquest and subjugation undermines his cosmopolitan inclination. First, "For Vitoria, the extraterritorial use of force was only justified in response to a harm inflicted." Second, in the "absence of an inflicted harm, the Emperor may not use violence abroad." Third, "not just any inflicted harm suffices to justify a violent response." Taken together, these three points entail that a "ruler has no more authority over foreigners than over his own citizens." And yet Vitoria relativizes the notion of a "qualified injury necessary to justify the extraterritorial use of force." Vitoria allows the Spanish to assert against Amerindians –by force if necessary– their natural right to engage in commerce, "not to be obstructed in proselytization," and "to protect converts and the innocent."

Third, for Vitoria, the goal of Christian conversion trumps indigenous preference. Indeed, it justifies undermining indigenous political communities: "if a good proportion of the barbarians were converted to Christ either rightfully or wrongfully (that is, ... even if they had been converted by threats, terror, or other impermissible means), the pope might have reasonable grounds for removing their infidel masters and giving them a Christian prince, whether or not they

asked him to do so" (287). Idris (2023, 144) notes an incongruity I examine below: "Vitoria acknowledges that the Native is human, that he has rights, that the various reasons for the conquest are basically unjust and self-serving, but, on the other hand, he apologizes that preaching Christianity must always be allowed and now that some Indigenous peoples have converted, it would be unjust for their dispossessors to just leave."

Fourth, Osborne identifies a puzzle in Vitoria's theological notion of human nature: "Just as an individual cannot give away his right to administer his affairs and defend himself, so a community cannot do away with its administration and defense. Such an attempt to disestablish any government would be against human nature, and consequently in violation of natural and divine law" (Osborne 2023, 17). Evidently, for Vitoria, the Spanish conquistadores can disestablish Amerindian governments without violating human nature.

But I also reject various strands in the scholarly literature. I do so where, in the following pages, I argue for the importance of realizing Vitoria's cosmopolitan potential, and where I show that his potential can be released by displacing his natural law argument with social construction. First, I reject apologetic readings that discount Vitoria's justifications for Spanish hegemony, such as the assertion by Kopel et al. (2007, 68) that "Vitoria's point was that international law protected everyone, not just Christians." As we will see, Vitoria claims –for theological reasons– that the Amerindians have no right to repel the Spanish invaders. Here Vitoria undermines his deep sense of the Amerindians' humanity.

Second, I reject Chetail's (2017, 905) claim that the "right of communication [in Vitoria] reflects a broader conception of international law grounded on reciprocity and equality between foreign nations," generating the "founding principle of a universal society composed by equal nations." As we will see, Vitoria justifies the colonial conquest of the New World in part on a right of communication because he frames such communication not as a dialog between equals but as the paternalistic tutelage of "barbarians" by the theologically enlightened Spanish. Chetail's (2016, 906) claim that "Vitoria wrote the prologue of international law by drawing the contours of an international society governed by universal norms" is false. I show that the prospect for such a society depends on the cosmopolitanism that only becomes possible with a naturalistic understanding of the world rather than one based on natural law.

Third, I refute conventional readings of Vitoria, such as Dierksmeier's (2019, 197), that claim that "Vitoria ascribed to the

American Indians, as *rational* beings, a claim to dignity and human rights equal to those of their European invaders." As we will see, Vitoria's characterization of the Spanish as reasonable, and the indigenous peoples as unreasonable, subverts his observations elsewhere in the lecture that the Amerindians had achieved well-ordered communities that accomplished many of the social tasks acknowledged by the Spanish to be important for human flourishing.

Fourth, I challenge Bunge's (2017, 54) assertion that we find in Vitoria a vision in which "different types of stakeholders such as individuals and social or political communities can act freely and (at least theoretically) interact on equal terms, such as the political entities of the people of America and Europe." I show that Vitoria compromises his recognition of the Amerindians' humanity by repeatedly understating, denying, or ignoring the systematic inequality between Europeans and Amerindians so clearly depicted in *De Indis*.

Fifth, I refute Barroso and Alves (2019, 181)'s statement that "Vitoria argues for pacific evangelization: the Gospel is to be rationally preached to the Indians and not imposed on them." By downplaying the massive inequalities between conqueror and conquered with regard to Christian proselytization (as we will see), Vitoria affirms the violent imposition of a foreign belief-system on conquered peoples rendered defenseless. In doing so, he undermines his own sense that Europeans and Amerindians could engage in rational dialog with one another.

Sixth, I counter the widespread claim (exemplified by Rodríguez-Santiago 2016, 303, n. 9) that Vitoria contributes to developing the notion of the self-determination of peoples in a system of international law that would prohibit not only the use of force in subduing the invaded, but foreign territorial conquest itself. As we will see, Vitoria entertains no such reciprocity. He asserts that, should the invaded take up arms against the invaders, the invaders have a right to attack the invaded: "if reasoning [by the Spanish] fails to win the acquiescence of the barbarians, and they insist on replying with violence, the Spaniards may defend themselves, and do everything needful for their own safety" (282). He nowhere entertains a reciprocal claim that the Amerindians have a right one day to arrive in Spain with armed men, seize Spain's natural resources, proselytize the Spanish in indigenous belief-systems, and dwell in Spain in perpetuity.

3. Inequalities with respect to rights to territorial sovereignty and self-defense

Vitoria structures his lecture as a series of claims and counterclaims about rights of the conquistadors in the Americas. He finds some claims justified; these he calls "just titles." Others he finds fallacious; these he calls "unjust titles." His lecture considers both sides of every argument and, "in every case of doubt," "consult[s] with those competent to pronounce upon it." "Those competent" are a small group of elite European authors, above all Aristotle and Thomas Aquinas, but also contemporaneous theologians and other scholars (237).³

This elite group cannot redeem Vitoria's claims. For example, Vitoria sources the purported right to travel in a text likely written in ancient Syria and completely foreign to the Amerindians: "I was a stranger and ye took me not in" (Matthew 25, 43). Vitoria claims: "from which it is clear that, since it is a law of nature to welcome strangers, this judgment of Christ is to be decreed amongst all men." Vitoria frames this Biblical injunction as a "right of natural partnership and communication" (278-279). But there is no partnership where Amerindians are bound by European cultural and theological traditions, yet the Europeans are not bound by the cultures and beliefs and traditions of the indigenous peoples.

Just as the invaded are hardly equal with the invaders, the relationship between the conquistadors and their victims is hardly equivalent to the relationship among sovereign European peoples. Even as France and Spain were not equals, France was much closer to Spain's level of power than to that of the Amerindian communities. France was a regional power with a relatively strong military, even as it was recovering from the effects of the Hundred Years' War with England, and even as it faced internal social unrest and economic difficulties. For its part, Spain ruled over a vast empire with territories in Europe, Asia, and the Americas. It had a formidable military, a strong economy—fueled by wealth extracted from its American colonies—and a dominant position in European politics. Yet Vitoria analogizes the relationship between these great European powers with that between Spain and the Amerindian communities it had conquered: "It would not be lawful for the French to prohibit Spaniards from travelling or even

³ Citations to Vitoria that reference solely page number(s) (and no name) refer to Vitoria (1991a) only.

living in France, or vice versa, so long as it caused no sort of harm to themselves; therefore, it is not lawful for the barbarians either" (278).

To be sure, at several points in his lecture Vitoria depicts a substantial degree of reciprocity in some aspects of Spanish-indigenous relations. He denies that the Spanish could rightfully possess the American lands by right of discovery (as Columbus maintained). He asserts that the claim of rightful (European) possession (of the Americas) by discovery "provides no support for possession of these lands, any more than it would if they had discovered us" (265). He argues in terms of what he declares to be a principle of the law of nations: the foreigners' right to hospitality in foreign lands:⁴ "if the barbarians allowed the Spaniards to carry on their business in peace among them, the Spaniards could make out no more just a case for seizing their goods than they could for seizing those of other Christians" (284). Similarly, because the "barbarians themselves admit all sorts of other barbarians from elsewhere," they would "therefore do wrong if they did not admit the Spaniards" (279). Further, the "barbarians can no more prohibit Spaniards from carrying on trade with them, than Christians can prohibit other Christians from doing the same" (280); "their princes cannot prevent their subjects from trading with the Spaniards, nor can the princes of Spain prohibit commerce with the barbarians" (279).

Vitoria portrays the relationship between invader and the invaded in terms of a "right of natural partnership and communication,"⁵ that is, a supposedly universal right that the Spanish can exercise against the indigenous peoples of the Americas –but not vice versa. He asserts that the "Spaniards have the right to travel and dwell in those countries, so long as they do no harm to the barbarians, and cannot be prevented by them from doing so. ... Amongst all nations it is considered inhumane to treat strangers and travelers badly without some special cause, humane and dutiful to behave hospitably to strangers" (278).

The qualification, "so long as they do no harm," would seem to limit foreign travel in several ways: to persons of moral integrity; to travel only for some necessity or to engage in mutually beneficial trade;⁶ to persons who fairly pay the hosts for lodging and food; and

⁴ For the canonical account see, e.g., Chetail (2016).

⁵ *Naturalis societas et communicationis*; §1 Question 3, Article 1: First just title, of natural partnership and communication.

⁶ Samuel Pufendorf (1632-1694) argues that, because all nations of the world equally constitute part of humanity, international law constitutes a common bond

to persons who depart the host venue as soon as possible. But as Vitoria knows, the Spanish violated the conditions of a purported right they give themselves. Even as he states that “these travels of the Spaniards are (as we may for the moment assume) neither harmful nor detrimental to the barbarians” (278), he knows that this assumption of a benign Spanish presence in the New World is an assumption *arguendo*, nothing more.⁷ Three years earlier, in a letter to Miguel de Arcos, he writes that the massacre at Cajamarca and Pizarro’s subsequent assassination of the Inca Atahualpa in July 1533 “shocks me,” “embarrasses me,” “freezes the blood in my veins” and that, “as far as I understand from eyewitnesses who were personally present during the recent battle with Atahualpa, neither he nor any of his people had ever done the slightest injury to the Christians, nor given them the least grounds for making war on them.” In short, the Indians “are most certainly innocents in this war” (Vitoria 1991b, 331-332).⁸

Further, with regard to a right to travel –one core justification of Spanish colonial conquest– Vitoria comments: the claim that the “affair is in the hands of men both learned and good,” and that “everything has been conducted with rectitude and justice,” is refuted “when we hear subsequently of bloody massacres and of innocent individuals pillaged of their possessions and dominions” (238). He establishes a standard for conduct that displays *rectitude and justice* also with regard to proselytization –another core justification of colonial conquest– that the Spanish never meet: the Amerindians “are not bound to believe unless the faith has been set before them with persuasive probability. But I have not heard of any miracles or signs, nor of any exemplary saintliness of life sufficient to convert them. On the contrary, I hear only of provocations, savage crimes, and multitudes of unholy acts” (271).

Vitoria envisions rectitude and justice along other dimensions of European/indigenous relations as well. He draws an analogy between the indigenous peoples and the French: because the French have as much right to enter Spain as the Spanish to enter France (“or vice

among them and not just among Christian nations (*De jure naturae et gentium* [1672]). Diderichsen (2020, 27) understands Pufendorf to assert that the “duty to sell does not include a duty to buy, which is why Vitoria is wrong in claiming that the Indians had a duty to accept Spanish traders, since they, being under no obligation to buy Spanish goods, had the right to restrict access to their lands.”

⁷ For Vitoria, “in the long run, intervention even with the best of intentions, may well lead to tragic consequences” (Muldoon 2006, 128).

⁸ Vitoria (1991b [1534]).

versa" (278)), then, by analogy, the American indigenous peoples have as much right to enter Spain as the Spanish to enter the Americas. Of course, the Spanish did not simply "enter" the Americas in some morally innocuous way; they invaded, with violence, while practicing enslavement and cultural annihilation. Vitoria does not invite the indigenous peoples to lay waste his own country, *his* people, *his* faith community, of course. So, in light of the European decimation of foreign communities in the sixteenth century, why does he argue for a universal right to enter foreign communities? Is he mocking the indigenous peoples by constructing (as he so often does) a merely formal analogy, along the dimension of rights, when in fact the maldistribution of power between sixteenth century Europe and the Americas meant that cosmopolitan ideas could be deployed in this context only cynically, to justify the unjustifiable?

4. Vitoria's abiding cosmopolitan potential released: first step

I propose revising Vitoria's approach. That approach undermines, in the various ways I noted above, the cosmopolitan potential of *De Indis*. The cosmopolitan intuition of the text disallows all the ways the text in fact permits conquest, violent subjugation, and colonial oppression. That intuition comes into view once the theological, natural-law framework of Vitoria's approach to the American indigenous peoples is replaced with what I will call a "naturalistic" framework.

A naturalistic understanding lends itself to the cosmopolitan ideal of international relations as relations among equals. Realizing that ideal involves the project of generating free and wide agreement on some of the normative questions confronting political communities domestically and internationally.⁹ As possible answers, that project admits only those that, while not themselves natural scientific, do not contradict a naturalistic understanding of the world. Here a fundamental political question is: By what norms do we members of a particular political community wish to be governed, for what reasons, to what ends? This approach is receptive to Vitoria's cosmopolitan intuition that no people would choose the subaltern position vis-à-vis other peoples in the way that Vitoria's actual theologically based approach positions the Amerindians as subaltern vis-à-vis Europeans.

⁹ At least in polities open to reasoned debate, to public reason, and to a politically free public sphere.

In other ways as well, Vitoria's theological, natural law-approach justifies a deeply unequal relationship between the victors and the vanquished. This theological approach frames communication between the Spanish and the Amerindians as unidirectional, that is, not as a reasoned dialog among equals but Amerindians as the addressees and recipients of disciplining and civilizing instruction by the Spanish. He describes the Spanish as open to reasoned argument (even as the invaders behave poorly toward the invaded). By contrast, he describes the indigenous populations as inclined to unreason (if only because of "their evil and barbarous education" (250)). If, in Christian proselytization, "reasoning fails to win the acquiescence of the barbarians, and they insist on replying with violence, the Spaniards may defend themselves, and do everything needful for their own safety" (282).

Also on a theological approach, Vitoria depicts the Amerindians as "weak and childish," "innocent" (283); "by nature cowardly, foolish, and ignorant" (282); "insensate and slow-witted" (250). It is "understandable," then, if they are prone to unwarranted fears of, and then perhaps violence against, "men whose customs seem so strange, and who they can see are armed and much stronger than themselves" (282). So he grants the invading Europeans the right to enslave the invaded population: "if the barbarians ... persist in their wickedness and strive to destroy the Spaniards, they may then treat them no longer as innocent enemies, but as treacherous foes against whom all rights of war can be exercised, including plunder, enslavement, deposition of their former masters, and the institution of new ones" (283).

Vitoria describes this violence as "merely defensive" by analogy to the relationship between the Spanish and the French forces: "the French hold Burgundy in the mistaken but colourable belief that it belongs to them. Now our emperor Charles V has a certain right to that province and may seek to recover it by war; but the French may defend it. The same may be true of the barbarians" (282). But Vitoria is concerned that the invaders' *justified* violent self-defense *might exceed* the "bounds of blameless self-defence," that the invaders "may not exercise the other rights of war against the barbarians such as putting them to death or looting and occupying their communities" (282). Vitoria again takes a theological approach where he analogizes inter-European strife to conflict between the Spanish and the Amerindians: "all things are lawful against Christians if they ever fight an unjust war; the barbarians should receive no preferential treatment because they are unbelievers, and therefore can be proceeded against in the same way" (283). The Spanish certainly gave the indigenous peoples of America "no preferential treatment." Hernán Cortés led an expedition

in 1519 that resulted in the conquest of the Aztec Empire. In 1532, Francisco Pizarro led one that resulted in the conquest of the Inca Empire. By contrast, Spain conquered a fellow Christian nation, Portugal, in 1580 and ruled over it until 1640. But whereas Portugal survives to this day, the Aztec and Inca empires ended with the Spanish invasions. The Europeans granted themselves a robust right of self-defense; they granted no such thing to the indigenous peoples.

Here, too, we can unlock Vitoria's cosmopolitan potential by displacing his original theological approach, which leads to grave injustice toward the conquered Amerindians, with a naturalist approach, which can facilitate a politics of justice. Let us begin with the term *human nature*. Human nature can be understood in cosmopolitan fashion if understood as the self-understanding of the human species in the sense of normative self-reflection (for example, in response to the question: *What kind of moral beings should we aspire to be?*). Members of a political community could respond to this question by constructing human rights and then by assigning those rights to themselves. In so doing, they would be acting in a way compatible with a naturalistic approach –because social construction does not violate a natural scientific understanding of the world. However, that approach would be incompatible with a theological one, which posits human rights as an otherworldly phenomenon, not of human hand.

As we saw, Vitoria's theological approach allows for privileging Europeans over Amerindians. By contrast, to understand human nature and human rights as social constructions –which are compatible with a naturalistic approach– is to exclude no peoples from human rights and is to neither privilege nor deprive any peoples with regard to human rights, because no people would construct themselves as inferior to other peoples. Even in a world of profound cultural and other differences among peoples, the cosmopolitan goal of establishing moral and legal equality may plausibly be pursued, whereas in Vitoria's theological approach such a goal is precluded: where one set of traditions, cultures, and faiths represents itself as superior to others. Given their contingently greater military, technological, and economic power, the Europeans were able to pursue a conquest in the Americas that Vitoria then defends theologically. But if Vitoria's understanding of the indigenous peoples is placed instead on a naturalistic basis, the cosmopolitan potential of his thought can be freed from its parochial features, by allowing the Amerindians as well as the Spanish to ask: How might we humans construct the human nature we have reason to prefer by constructing the human rights we have reason to demand? The answer to this

question involves the replacement –with cosmopolitan political notions that a naturalistic approach facilitates– of the “essentialism” that marks natural law-notions of both human rights and human nature.

Theological natural law theory employs what I term *human nature-essentialism* and *human-rights essentialism*. It does so by positing human traits that are purportedly innate, invariant, universal, and unique. And it does so by construing a trait as having intrinsic moral value –intrinsic because natural law theory construes human nature as an essence. From the standpoint of logical consistency, the indigenous peoples of the world would, according to this theory, share in this essence no less than the Europeans. But Vitoria deploys theory in ways that render the indigenous people inferior to the Europeans along multiple dimensions. By doing so, he fails the cosmopolitan potential in his lecture.

Exchanging human-nature-essentialism with a notion of human nature as something socially constructed opens a path to allowing each people to assert its human nature and thereby reject any inferior moral status that others might otherwise assign to it. Understanding human nature as socially constructed implies recognizing that definitions of human nature are shaped by cultural, historical, and social contexts rather than by fixed biological or metaphysical essences. This perspective fosters a greater appreciation for the diversity of human experiences and the legitimacy of each group's self-conception. A people that views human nature as a social construct is more likely to understand that no group would define its human nature as inherently inferior. This realization promotes mutual respect and the recognition of equal moral status across different groups.

Viewing human nature as socially constructed leads to greater likelihood of mutual recognition for several reasons. First, when human nature is viewed as a construct, it encourages relativism and pluralism, where different cultures and societies are seen as equally valid. This perspective reduces the tendency to rank cultures hierarchically and instead promotes viewing them as different but equal expressions of human potential. Second, understanding that human nature is shaped by social contexts fosters empathy. People are more likely to appreciate the unique challenges and achievements of other groups when they recognize the socially constructed nature of identity and values. While such an outcome is not guaranteed, it is more likely among peoples who view human nature as a social construct than among those who see it as a fixed essence. The essentialist view tends to support static and hierarchical understandings of human differences, which can perpetuate inequality and moral superiority.

5. Inequalities with respect to self-determination and self-government

Vitoria disaggregates two meanings associated with the ancient Roman notion of dominion: first, ownership (which, according to Vitoria, the Amerindians enjoyed); second, jurisdiction or the authority to administer justice and enforce law throughout indigenous territory (which the Amerindians did not enjoy). As the Spanish crown extended its rule to territories in Central and South America through territorial conquest and subjugation, the invaded peoples lost both jurisdiction and ownership. The Spanish monarch himself convened the Real y Supremo Consejo de Castilla, composed of theologians and other experts in canon and civil law. In 1513, twenty-four years before Vitoria delivered his public lecture, the Consejo issued the *Requerimiento*. It proclaimed Castile's divine right to seize all the territories "discovered" by Spain in the *Indias Occidentales*.

Vitoria discusses communal "dominion" or self-determination in terms of territory. He asserts that the "Spaniards, when they first sailed to the land of the barbarians, carried with them no right at all to occupy" indigenous lands (264), lands the "barbarians undoubtedly possessed as true dominion, both public and private" (241). Hence the Amerindians "could not be robbed of their property, either as private citizens or as princes, on the grounds that they were not true masters" of that property (250-251). Vitoria rejects the colonial right of discovery claimed by Europeans: "barbarians possessed true public and private dominion," and while the law of nations "expressly states that goods which belong to no owner pass to the occupier," the "goods in question here had an owner," hence "they do not fall under this title" (264-265). Indeed, "granting that these barbarians are as foolish and slow-witted as people say they are, it is still wrong to use this as grounds to deny their true dominion; nor can they be counted among the slaves" (251).

In another rejection of reciprocity, Vitoria posits –but only for the Spanish– a right of humanitarian intervention. He allows intervention into indigenous affairs in response to the "personal tyranny of the barbarians' masters towards their subjects, or because of their tyrannical and oppressive laws against the innocent, such as human sacrifice practised on innocent men or the killing of condemned criminals for cannibalism" (287-288). Vitoria asserts that, "in lawful defence of the innocent from unjust death," his countrymen "may prohibit the barbarians from practising any nefarious custom or rite"; they may "force the barbarians to give up such rites altogether"; and

they may declare war on them if they resist, and even depose and replace their leadership with “new princes” (288). In the face of Spanish judgement, indigenous culture, traditions, and preferences count for nothing: “It makes no difference that all the barbarians consent to these kinds of rites and sacrifices, or that they refuse to accept the Spaniards as their liberators in the matter” (288). The Amerindians cannot represent or decide for themselves; they require the morally and civilizational superior Spanish to represent their best interests. Vitoria cannot contemplate the idea that perhaps the indigenous peoples of the Americas “may prohibit” the Spanish from “practicing any nefarious custom or rite.” Here he proclaims Spanish hegemony; he is hardly anticipating the “responsibility to protect” doctrine of today.¹⁰

Vitoria's defense of Spanish hegemony deflates his initially cosmopolitan claims about international reciprocity. For example, he states that treaties between an indigenous people and the Spanish crown are legitimate only if the indigenous party clearly understands what treaty terms entail for them –as well as the consequences of Spanish designs for indigenous interests (276). Treaties are legitimate only if the native populations freely consent to them: any decision by the “fearful and defenseless” peoples –“surround[ed]” by “armed men”– to recognize the Spanish colonializers and their monarch cannot be legitimate if made “in fear and ignorance” (276).

A “law of nations,” understood as international majoritarianism, offers one alternative to Spanish hegemony that Vitoria defends. But his lecture does not imagine any kind of cosmopolitan membership that would include non-European powers. While he may truly believe that “there are certainly many things which are clearly to be settled on the basis of the law of nations,” his claim that the “consent of the greater part of the world is enough to make it binding, especially when it is for the common good of all men (280-281), is meaningless in his own time, in a sixteenth century world of massive differences in power,¹¹ where the indigenous are not among those nations that would define one notion or another of international law, consent to it,

¹⁰ Adopted by the United Nations General Assembly in 2005 (<https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml>), the doctrine asserts the primary responsibility of individual nation states to protect their respective populations from mass atrocities and the “international community's” responsibility for assisting states in fulfilling that responsibility through timely and decisive action through diplomatic and humanitarian means and, if necessary, the use of force.

¹¹ And is meaningful today only to a very limited extent.

or otherwise determine what might be “for the common good of all men.”

In these ways, Vitoria's natural-law approach severely compromises the Amerindians' role in determining their own political affairs and renders them distinctly unequal to the Spanish. Even then, traces of cosmopolitanism can be found in Vitoria's brief exploration of resolving social and political issues through rational argument. Ideally, this process allows the best argument to prevail, rather than being influenced by extraneous factors such as the relative political, economic, military, and technological power of the involved peoples.¹²

6. Vitoria's abiding cosmopolitan potential released: second step

The cosmopolitan potential of rational argument across different peoples ceases with the conviction that “if the Christian faith is set before the barbarians in a probable fashion, that is with provable and rational arguments and accompanied by manners both decent and observant of the law of nature, such as are themselves a great argument for the truth of the faith, and if this is done not once or in a perfunctory way, but diligently and observantly, then the barbarians are obliged to accept the faith of Christ” (270).

Here Vitoria posits reasoned argument, then undermines that posit by asserting the necessity of one particular outcome, and by claiming that the Amerindians could not possibly reach any other reasoned outcome. But under these circumstances, the outcome is not reasoned; it is dogmatic. It is not the product of two sides achieving agreement through reasoned argument; it is a stronger peoples' imposition on weaker peoples. And the potential cosmopolitanism of Vitoria's notion of reasoned argument is undone by his account of reason as a peculiarly Christian trait: “man is the image of God by his inborn nature, that is by his rational powers” (242).

To be sure, Vitoria's defense of the freedom of conscience is striking for a sixteenth century theologian.¹³ He asserts that the

¹² In the sense of Habermas (1993).

¹³ But hardly unique with respect to the idea of tolerance within European communities. Vitoria is joined by the Dutch humanist Erasmus (1466–1536), who called for a more tolerant and open-minded attitude toward differing beliefs; the French philosopher Montaigne (1533–1592), who defended the rights of individuals to hold

“barbarians ... are not in point of fact madmen, but have judgment like other men”: “they have some order in their affairs: they have properly organized cities, proper marriages, magistrates and overlords, laws, industries, and commerce, all of which require the use of reason. They likewise have a form of religion, and they correctly apprehend things which are evident to other men, which indicates the use of reason” (250). Here Vitoria speaks in his most cosmopolitan voice, recognizing indigenous cultures and peoples in what Vitoria appears to view as universal categories of social organization. But his lecture cannot realize the potential of that cosmopolitanism when its author then judges indigenous peoples from the religious tradition that the author happened to have been born into (and that claims universal validity *a priori*). Vitoria cannot view his particular faith as historically and culturally contingent and perspectival. Perhaps no sixteenth century theologian could; many theologians today cannot.

On the one hand, Vitoria does not argue that the indigenous peoples need to convert to Christianity to be capable of self-governance, or that they need to adopt other European attitudes and behaviors. The Amerindians' right of dominion or self-governance is not “annulled by lack of faith” (245), whereby Vitoria, in speaking of faith, surely intends solely Christianity (indeed, Roman Catholicism).¹⁴ Vitoria is cosmopolitan in his support for freedom of individual conscience. That support stands in tension with what Vitoria regards as the singular, exclusive, and universal validity of his particular faith.

On the other hand, Vitoria constructs a kind of epistemic inequality, along three dimensions. First, he believes that the “barbarians are not impeded from being true masters, publicly and privately, either by mortal sin in general or by the particular sin of unbelief. Nor can Christians use either of these arguments to support their title to dispossess the barbarians of goods and lands” (246). Yet a belief that seems to display a certain tolerance of some of the ways the Amerindians differ from Europeans in fact invokes mortal sin and

their own beliefs and opinions without fear of persecution; and the German Protestant Reformer Luther (1483–1546), who emphasized the primacy of conscience in matters of faith. Other thinkers reject such tolerance.

The French theologian Calvin (1509–1564) imposed doctrinal standards and moral guidelines on the freedom of conscience. The English statesman and Catholic martyr Thomas More (1478–1535) believed that conscience must be guided by established religious authority and tradition, not by individual interpretation.

¹⁴ As one gathers for example from his contention that “a Catholic may lawfully purchase goods from a German heretic. It would be harsh if a Catholic could not lawfully buy or sell lands to a heretic in a Lutheran city” (246).

thereby applies to Amerindians a culturally thick theological notion¹⁵ entirely foreign to their own cultures and belief systems. Further, Vitoria nowhere entertains the thought that indigenous notions might be applied to Europeans, for whom such notions would also be quite foreign. Second, Vitoria argues that "under divine law a heretic does not forfeit his right of Ownership" (244). *Divine law* here refers to a peculiarly Christian construction that the Amerindians were unlikely to understand in the way that Vitoria addresses it to them. Third, Vitoria never asks himself: might the Christian conquistadores be impeded from being "true masters" because *they* violate indigenous cultural and normative precepts and understandings?

Along these dimensions, Vitoria's lecture betrays and negates the cosmopolitan openness to rational discourse that his buried intuition warrants: that the "barbarians are not bound to believe from the first moment that the Christian faith is announced to them," and that Christians cannot expect the Amerindians to be bound through "a simple announcement, unaccompanied by miracles or any other kind of proof or persuasion, that the true religion is Christian." It is "foolhardy and imprudent of anyone to believe a thing without being sure it comes from a trustworthy source." The "barbarians could not be sure of this, since they did not know who or what kind of people they were who preached the new religion to them" (269).

Yet Vitoria negates the cosmopolitan openness to rational discourse in a community of members mutually seeking (and perhaps sometimes finding) the better argument, freely and consensually. For he declares that the answer – "that the true religion is Christian" – is always already given, dogmatically, immediately, universally, regardless of any and all discussion and argument.¹⁶ His theological conviction contradicts the natural scientific observation that all humans are more or less equal in terms of evolved cognitive capacity: while "the chief attribute of man is reason," the Amerindians "were for so many thousands of years outside the state of salvation, since they were born in sin but did not have the use of reason to prompt them to seek baptism or the things necessary for salvation" (250).¹⁷

¹⁵ *Thick* in the sense I develop in Gregg (2003).

¹⁶ Accordingly, Vitoria reserves to Christians a religion-specific right of foreign conquest: "we do not deny the right of ownership" of "Saracens [i.e., Muslims] and Jews, who have been continual enemies of the Christian religion," "unless it be in the case of Christian lands which they have conquered" (251).

¹⁷ Note two further examples of Vitoria frustrating the cosmopolitan potential of his own thought. First, he imagines adjudicating disputed or contentious matters of international relations by law rather than force yet shatters that potential when he

7. Inequality with regard to indigenous freedom of conscience in the face of Christian proselytization

In two ways, at least, Vitoria adopts a parochial stance toward the status of the Amerindians' comprehensive belief-systems. First, the imperative of Christian conversion takes precedence over any possible indigenous perspective or preference. Vitoria views the indigenous peoples as unequal to the Spanish invaders in part because only the latter embrace the one true faith. The Amerindians, by contrast, stand in need of its moral instruction (even if they fail to realize as much). Vitoria allows the Amerindians a limited right to freedom from coercion along several dimensions. With respect to faith he avers that "war is no argument for the truth of the Christian faith. Hence the barbarians cannot be moved by war to believe" (272). With respect to customary practices, he declares that "Christian princes ... may not compel the barbarians to give up their sins against the law of nature, nor punish them for such sins" (273). And with respect to both, Vitoria concedes that the Amerindians, even though they "have never received any news of the faith or Christian religion" (269), nonetheless have developed systems of law and morality. They have shown themselves able to live with one another in peace. They are clearly capable of living, without Christian revelation, a good and moral life, indeed, one "according to the law of nature" (269).

Vitoria can attribute a natural law conscience to the indigenous peoples because he thinks of humankind in terms of a "human nature" that includes this trait (which is hardly surprising because *nature* for Vitoria is something profoundly Christian). So even as Vitoria posits a right of indigenous peoples to their own belief and cultural systems, he accords them no right to be free from the Christian

construes international law not as international agreements freely entered in, regulated by legal instruments jointly authored by all parties, but as the parochial commitments of a particular faith: the "law of nations, which either is or derives from natural law" (278). Diderichsen (2020, 24) may unintentionally confirm this conclusion where he writes that "Vitoria's somewhat guarded defense of Spanish colonialism was immensely important for both international law and later attempts at legitimizing various European colonial enterprises." Second, Vitoria makes the cosmopolitan claim that political communities enjoy dominion (or self-determination) independently of each other. He states that the Amerindians had "dominion" before being invaded by the Spanish and—in an absurd claim— even after. But what Vitoria claims to be self-determination is no act of communal autonomy but rather an act of divine heteronomy: "every dominion exists by God's authority, since He is creator of all things and no one may have such dominion unless he is given it by God" (241).

invaders' proselytization. On the contrary, the indigenous are "obliged to listen" to the Spanish (271), who may condemn them should they decline to "listen" (270): "if the barbarians permit the Spaniards to preach the Gospel freely and without hindrance, then whether or not they accept the faith, it will not be lawful to attempt to impose anything on them by war, or otherwise conquer their lands" (285). Thus "obliged at least to listen and consider what anyone may advise them to hear and meditate concerning religion" (271)¹⁸ –and absent any kind of reciprocal right to proselytize the Spanish– the indigenous peoples can make but one correct choice theologically: "to accept the faith of Christ under pain of moral sin" (271).

Note, yet again, the lack of reciprocity: for Vitoria it is self-evident that the indigenous, in their own lands, are properly addressees of Christian proselytization. For him it is self-evident that the Spanish may enforce the imperative of proselytization against the will of the indigenous, and that the indigenous are constrained to allow themselves to be proselytized. And it is self-evident that the Spanish, living in indigenous lands without invitation or permission, cannot possibly be addressees of indigenous proselytization.

Further, Vitoria justifies violence in pursuing this imperative of Christian proselytization:¹⁹ "if the barbarians [...] obstruct the Spaniards in their free propagation of the Gospel, the Spaniards, after first reasoning with them to remove any cause of provocation, may preach and work for the conversion of that people even against their will, and may if necessary take up arms and declare war on them, insofar as this provides the safety and opportunity needed to preach the Gospel. And the same holds true if they permit the Spaniards to preach, but do not allow conversions, either by killing or punishing the converts to Christ, or by deterring them by threats or other means" (285).²⁰

¹⁸ The full clause reads: "they are obliged to listen, because if they were not obliged to hear they would be beyond all salvation through no fault of their own" (271).

¹⁹ With the opaque qualification: "so long as [the Spanish] always observe reasonable limits and do not go further than necessary" (286).

²⁰ He adds: "such actions would constitute a wrong committed by the barbarians against the Spaniards ... and the latter therefore have just cause for war" (285). Vitoria defines *just wars* as "those which avenge injustices, when a nation or city is to be scourged for having failed to punish the wrongdoings its own people or to restore property which has been unjustly stolen. If the barbarians have done no wrong, there is no just cause for war," hence just war cannot justify the Spanish "occupying the lands of the barbarians and despoiling their previous owners of them" (270). Yet Vitoria then

8. Vitoria's abiding cosmopolitan potential released: third step

Part 2 developed one approach, and part 4 developed another, toward liberating the cosmopolitan potential of Vitoria's lecture. Each approach substitutes the lecture's basis in natural law with a basis in social construction (which aligns with naturalism). I conclude with one final proposal to free the cosmopolitan potential of Vitoria's intuition about the humanity of the Amerindians. I do so with respect to two concepts. First, I reject one widespread way of framing human rights, and second, I reject one common approach to viewing human nature. I argue that neither human rights nor human nature should be imagined as some kind of unchanging essence quite independent of human culture over time. Rather, each should be understood as a social construct.

First, I reject what I call "human rights-essentialism." Most accounts of human rights cast them in terms of rights universally valid *a priori*, in some ways akin to Vitoria's understanding of the natural law as equally valid for the Spanish who brought it to American shores and the indigenous peoples on whom the Spanish imposed it. Most versions of the human rights project²¹ invoke one or the other notion of human nature as their normative foundation. Some versions regard human nature as an essence of some kind. The United Nations' 1948 *Universal Declaration of Human Rights*, for example, sources human rights in a human individual's "inherent dignity" where "dignity" functions in the document as a trait morally essential to human nature.²²

Other forms of human rights-essentialism ground human rights in human biology. Human rights so conceived use biological traits such as

says that "if the business of religion cannot otherwise be forwarded, ... the Spaniards may lawfully conquer the territories of these people, deposing their old masters and setting up new ones and carrying out all the things which are lawfully permitted in other just wars by the law of war" (285-286). To modern ears, he sounds as if he is mocking the victims of Spanish conquest when he states that the Spanish "must ... always direct all their plans to the benefit of the barbarians rather than their own profit," where *profit* may be understood to include the colonial imperative of Christian conversion (286).

²¹ By the term *human rights project*, I refer to social, political, philosophical, and legal movements to advance human rights thinking and practice as widely and deeply as possible (Gregg 2012 and 2016). In that quest, the project contributes to broader social movements seeking to limit government and to restrain state sovereignty (for example, through liberal constitutions and bills of rights, or by opposing racism and sexism, torture, and genocide).

²² Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess, U.N. Doc. A/RES/3/217A (1948).

"potentiality, life, sentience, consciousness, [and] self-consciousness" to "establish our basic universal entitlements" (Cochrane 2012, 309, 310). Yet other forms ground human rights in the capacity for rational and principled agency (Griffin 2008; Gewirth 1982); in a range of capabilities²³ (Nussbaum 1998); in a set of shared basic interests (Tasioulas 2010); or in kinds of vulnerability regarded as peculiarly human (Turner 1993).

Theological and biological forms of human rights-essentialism are both vulnerable on multiple fronts. Consider the linked claims that some human capacities (such as language use) may be "natural" and universally present in the species. These claims do not entail a fixed human nature. They do not entail the moral status of those features. Even if one believes that moral capacity requires certain biological characteristics (such as a nervous system, sentience, cognition, and self-consciousness), one would still have to show that these characteristics have a moral status. No one has ever shown as much. And the status of being a bearer of human rights can hardly follow from biological traits which have no moral status.

Now consider an alternative way of framing human rights, a way that can contribute to freeing the cosmopolitan potential of Vitoria's thought: a rights claim is always a *cultural* claim because all norms, including human rights, are cultural artifacts. As such, they can only be contingent preferences. They can be valid only for the cultures and communities that embrace them (even as some cultures and communities may often face political or other imperatives to stress what is shared across such cultural differences).²⁴ They cannot be valid

²³ For example, capabilities to live to the end of a human life of normal length; to have good health; to be secure against violent assault; to use one's mind in ways protected by guarantees of freedom of expression; to engage in critical reflection about the planning of one's life; to have the social bases of self-respect; and to have control over one's political and one's material environments.

²⁴ For example, in 1947 the American Anthropological Association (AAA) objected to the United Nations' proposed Universal Declaration of Human Rights, asking: "How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?" Yet fifty years later the AAA officially embraced the idea of human rights, now finding the idea compatible with "anthropological principles of respect for concrete human differences, both collective and individual, rather than the abstract legal uniformity of Western tradition." In one respect, AAA's 1999 statement coheres with its 1947 statement: it maintains that irreducible cultural differences exist no less than tensions between such differences and the uniformity of any system of normative rules (including human rights). But in 1999 the AAA argued that human rights norms can be reconciled with irreducible cultural differences among

a priori or valid independent of membership in political community. As cultural artifacts, they are constructed within political community. They are possible only within it; there are no legal (or other) rights outside of, or antecedent to, political community.

Second, I reject what I term “human nature-essentialism.” It is connected to human rights-essentialism. Human rights-essentialism “entails that rights exist prior to membership in a community” and, in many versions, it locates them in human nature, “either human nature as such or in a characteristic or power ... thought to be essential to a human being” (Parekh 2007, 773). There are more than thirty recent scholarly accounts of the term *human nature*. There are even more religious accounts (as well as folk versions) (Fuentes 2008). Many of the latter -including Vitoria's natural law version- employ human nature-essentialism. It posits essential human traits. This is a notion of fixed traits with multiple qualifiers. These are traits that do not vary across cultures (Griffiths, Machery and Liguist 2009). They are present at birth, that is, they are not acquired through education or any other form of socialization within human community, and independent of their environment. These traits are invariant, which entails an historically unchanging “core” of human traits, constraining all possible diversity²⁵ and variation in traits and capacities, even as it may allow for some malleability.²⁶ The traits are universal: the relevant traits affect some aspects of all human cultures and, from an anthropological standpoint, lead to a limited set of cultural universals (Pinker 2002).²⁷ And they are unique: while they

different communities. Tellingly, it neglected to say just how. Likely it was unable to say just how; on this point, political imperatives “colonized” the discipline.

²⁵ Diverse evolutionary processes, including drift, adaptation, and phylogenetic constraints, have contributed to widespread human traits. Such traits by definition cannot be necessary but only contingent.

²⁶ If one thinks of human nature as traits and behaviors that are shared in patterns, one confronts the question: to what extent are these patterns fixed, and to what extent, malleable? Human nature-essentialism argues for strongly fixed traits and would regard an extremely malleable nature as no nature at all. By contrast, a non-essentializing account argues that abiding cultural patterns generate the cultural similarity that underlies so much of the variation within and among human cultures. The resilience of these patterns over time can be explained in a this-worldly way. While not itself naturalistic (the patterns are not biologically determined nor are they products of natural selection), this way does not contradict a naturalistic understanding of the world. The resilience of some cultural patterns does not require innate, invariant, or otherwise “essential” traits; it does not require an otherworldly account. Compare Gregg (2021).

²⁷ Yet traits universally present are not necessarily adaptations. An adaptation is not necessarily universal but could be local.

express themselves in most individuals, they are unique to the species.²⁸

But if framed naturalistically, with implications that can contribute to freeing the cosmopolitan potential of Vitoria's thought, human nature is understood to be something learned in particular cultures at particular times. It is then a phenomenon contingent,²⁹ historically and culturally embedded, plural, and one that changes over time. Human nature is something acquired through learning and teaching (Downes and Machery 2013).

So conceived, it is not a static essence with innate properties; it marks a dynamic relationship between biology and culture.³⁰ That relationship can be modeled in various ways (Gregg 2022). For example, changes in ecologies affect patterns, foci, and intensity of natural selection, in turn affecting ecological inheritance. I refer to the "niche construction model," according to which organisms influence their local ecologies and consequently their evolutionary trajectories. Organisms are shaped by their ecologies even as they shape their ecologies. According to a different approach, the "gene-culture co-evolution model," human biology and human culture influence one

²⁸ The conceptual overlap among these traits entwines them in any given account.

²⁹ The question of contingency is one of the many ways that human nature and human rights intersect. If human nature is contingent, as Harris (2011) urges, because evolved human genetic identity, by definition, is not fixed, then it can hardly ground human rights if human rights are construed as permanent and unchanging, necessary and not contingent.

³⁰ According to Tomasello (2019, 4), "human individuals come to the species-unique cognitive and social abilities necessary for participating in cultural coordination and transmission" by three developmental pathways. First, the "maturation of children's capacities for shared intentionality," with the emergence of joint intentionality at round nine months of age," and then with the "emergence of collective intentionality at around three years of age" (ibid., 8). Second, individual participants learn to grasp and adopt the perspective of other individuals, leading to a shared perspective whereby different persons can identify the same (jointly identified or perceived) concern, focus on the same (jointly perceived or identified) idea (including things not real or not present) or object (including objects not present or out of sight). Third, "children attempt to executively self-regulate their thoughts and actions not just individually, as do many primates, but also socially, through their constant monitoring of the perspectives and evaluation of social partners on the self" (ibid., 9). Here we have an empirically informed account the origins of the human capacity for morality and, ultimately, the kind of politics that can lead to the social construction of human rights. Tomasello locates in our organic nature the pre-history of our socio-cultural learning processes. These require social-cognitive conditions independently of genetic adaptation. Evidently humans cannot be "humans" without the culture that unlocks the potential of the biological human. Humans construct themselves culturally by drawing on their biology, and biologically by drawing on their culture.

another reciprocally. In both models, human agency is itself a source of variation in human genetics and human culture. Variation is a significant means of evolutionary change just as cultural variation is a means of cultural change. Both human biology and human culture transfer phenotypic variations from one generation to the next (Jablonka and Lamb 2005).

This observation is consequential for the project of releasing the cosmopolitan potential in Vitoria's lecture *On the American Indians*. The lecture could fully embrace its occasional intuition that the indigenous peoples possess the same human nature, and are capable of bearing the same human rights, as Europeans. And the lecture could fully abandon its repeated assertions of inequality among different peoples and their respective cultures, polities, economies, and belief systems. Vitoria's argument would then grasp the cultural differences not as essential but as contingent variations that, like all human artifacts, can be (and have been) endlessly molded and reshaped over time, across the globe. In doing so, Vitoria could fully embrace his intuition that the indigenous peoples and the Europeans can relate to each other as moral equals.

Human nature as a social construction, like human rights as a social construction, can avoid the anti-cosmopolitan parochialism of essentializing approaches. Vitoria's theological natural law provides no support for international relations based on equality and reciprocity because it cannot see beyond its own historically and culturally embedded standpoint. And from that embeddedness, chauvinism may follow. Excising the essentializing elements in Vitoria's lecture, and replacing them with social construction, would strengthen Vitoria's cosmopolitan intuitions. Those intuitions support European/indigenous relations on the basis of tolerance of difference and of insistence on equality.

This approach understands human nature and human rights not as static essences but as examples of adaptation to historical experiences, natural environments, and cultural commitments. Adaptation here is cultural not biological. The human species is a cultural species: it accomplishes most of its tasks in communal and individual life by means of cultural learning (Ayala 2012; Richerson and Boyd 2008). Cultural evolution is possible through human intelligence, which allows human communities to adapt themselves to their changing environments and their shifting self-understandings, particularly through teaching and learning (Gregg 2014 and 2015). The plasticity or malleability in outcomes of human development allow one to envision indigenous peoples interacting with Europeans not as

inherently inferior but as moral equals. As moral equals, each has reason to embark on the same cosmopolitan project of just relations among peoples.

Conclusion: Realizing a sixteenth century cosmopolitan intuition for indigenous peoples today

De Indis constructs differences among the European and the indigenous peoples of America in ways that undermine Vitoria's cosmopolitan intuition of fundamental moral equality of the Spanish and the Amerindians. One set of differences preexisted the arrival of Europeans in the Americas: differences in culture, political community, economy, and belief system. Another kind of difference commences with that arrival: differences in power, from technology and military might to economy.

My argument focuses on a third set of differences that springs from inequalities created by colonial conquest. I identified several types of inequality in Vitoria's treatment of the Amerindians: with respect to rights to territorial sovereignty and self-defense (part 1); with respect to self-determination and self-government (part 3); epistemically (i.e., Spanish cultural and normative precepts and understandings apply to the Amerindians but those of the indigenous peoples do not apply to the Spanish) (part 4); and with regard to indigenous freedom of conscience in the face of Christian proselytization (part 5). Expressing the cosmopolitan potential of Vitoria's lecture requires abandoning the essentializing, theological, natural-law basis on which Vitoria draws such distinctions. He can regard them as justified only because he views them as somehow essential. But the cosmopolitan in Vitoria knows that they are not. They are social constructs.

Social construction, compatible with a naturalistic rather than theological understanding of the world, reveals these differences to be contingent rather than essential, human-made rather than divinely ordained.

Once these differences are shown to be constructions of Spanish colonial conquest, one is prepared to regard, as contingent, material inequalities among different peoples and communities in the sixteenth century. One can then see that the extraordinary wealth, power, and technological and scientific capacity of sixteenth century Spain does not entail the moral superiority of the Spanish vis-à-vis the Amerindians. One can see that the material status of a culture at any given time has no otherworldly significance that implies which peoples

may rightfully conquer and colonize others. This insight –based on the contemporary social scientific approach of social construction, with its thisworldly naturalism in contrast to otherworldly natural law–promotes Vitoria's cosmopolitan intuition about the moral equality of different peoples in ways plausible in today's world. This is one potential of Vitoria's lecture from 490 years ago: to contribute, in the twenty-first century, to discouraging violent forms of social, economic, and political interaction among peoples; to encouraging tolerance for the multiplicity of different cultural traditions and experiences worldwide; and to reworking ever greater globalization in de-colonizing ways.

This potential leads to another. The cosmopolitan potential of Vitoria's lecture is obstructed by its medieval theological framework of scholastic reasoning (the framework of the School of Salamanca). The importance of rescuing that potential from five centuries ago lies in promoting the promise of international law today. Each of this essay's six parts identified this obstruction in one of its forms: (1) While Vitoria acknowledges the idea of reciprocal principles in Spanish/indigenous relations, he justifies Spanish violations. (2) In place of a theological approach that justifies unequal relationships, Vitoria's lecture could be reformulated within a naturalistic framework that would allow each group to construct its own human rights. (3) While acknowledging Amerindians' land ownership, Vitoria asserts Spanish hegemony and a unilateral right of intervention. (4) While sympathetic to freedom of conscience, Vitoria is unable to judge indigenous cultures from any perspective other than that of scholasticism. (5) Although at points he yearns for reciprocity between Amerindians and Europeans, Vitoria prioritizes Christian conversion over indigenous perspectives. (6) Vitoria's natural-law theology takes an essentializing approach to human rights, thereby fixing human traits with inherent moral significance. And it takes an essentializing approach to human nature, positing innate, unchanging human traits as the basis for rights. On this basis, Vitoria's lecture can justify Spanish injustice toward the Amerindians.

But if human rights and human nature can be understood as social constructs, Vitoria's thought could transcend cultural parochialism and realize its cosmopolitan intuition of indigenous/European interaction on the basis of equality, reciprocity, and moral equality. International law requires just such a basis. I imagine here a basis that does not yet exist. National sovereignty is the fundamental principle of political organization in the world today. In many cases, national sovereignty functions as a domestic warrant for disregarding international law. So

in a world of national sovereignties, international law works best when based on the consent of all participating states. Yet even states that formally agree to international instruments may not actually observe them (Hathaway 2002).

Even customary international law and peremptory norms or *jus cogens* (prohibiting, say, wars of territorial aggrandizement, some of which victimize indigenous peoples), which presume to bind states even without their consent, in most cases lack an enforcement mechanism. Moreover, international law does not codify any set of rights that is universally embraced by all nations equally. Correspondingly, there is no consensual, internationally accepted understanding of the term *indigeneity* or of what makes an indigenous people indigenous. There is no global indigenous identity that includes all self-identified indigenous peoples (Gregg 2019).

Not surprisingly, today state-based indigenous rights in many cases are more effective than rights promised by international law.³¹ International law aims at stable and organized relations among states. It rarely benefits indigenous communities because the fate of indigenous peoples rests largely with the nation state in which

³¹ State-level implementation in some cases has yielded more tangible outcomes compared to international promises. For example, the Canadian government has made significant strides in recognizing and implementing indigenous rights through agreements and treaties, such as the creation of Nunavut, the settlement of comprehensive land claims, and ongoing efforts towards reconciliation. Further, in New Zealand, the Treaty of Waitangi and subsequent legal interpretations and settlements have provided a framework for addressing Maori rights within the state's legal system, resulting in tangible benefits and recognition of Maori land and cultural rights. And although there are ongoing challenges in Australia, state-based efforts like the Native Title Act and various land rights legislations have provided frameworks for the recognition and protection of indigenous land rights. By contrast, despite constitutional protections, indigenous lands in Brazil face significant threats from illegal logging, mining, and agricultural expansion. The government has often failed to enforce land rights and protect indigenous communities from encroachments. Indigenous communities in India frequently face displacement and marginalization due to large-scale development projects such as dams, mining, and industrial activities. State protections are often inadequate to prevent these displacements. In Indonesia, indigenous land rights are frequently overridden by commercial interests, particularly in the palm oil and logging industries. Government policies and enforcement often favor large corporations over indigenous claims. Indigenous peoples in Malaysia, particularly in Sarawak and Sabah, face extensive logging and land conversion activities that threaten their traditional lands. Legal protections are weak, and enforcement is often biased in favor of commercial interests. And indigenous communities in Siberia and the Russian Far East face significant challenges from oil, gas, and mining operations. The government's focus on resource extraction often overlooks or undermines indigenous rights and environmental protections.

indigenous peoples live. The “international legal status of indigenous peoples” rests on the “sovereign power of the States in which they are located” (Macklem 2015, 162).

To be sure, the last six or seven decades have seen various international efforts to benefit indigenous peoples. Among other instruments, the United Nations Declaration on the Rights of Indigenous Peoples³² and the International Labour Organization's Convention (No. 169)³³ advocate for indigenous peoples at a politically elite level. Yet the political force of such efforts in many cases is not primarily legal –in the sense of legally binding domestic legal systems; often the political force is only rhetorical and symbolic.³⁴

To facilitate indigenous self-identification, self-determination, and rights in today's world, an alternative to current international law is needed. Needed is a kind of international law that replaces our status quo in which the “principles, norms, and procedures that fall within the rubric of international law remain substantially state-centered and the rhetoric of state sovereignty continues as central to international legal discourse” (Anaya 1996, 39). Today, states –not indigenous peoples– find support in international instruments that generally are the work of state representatives and are state-centric.

³² “DOTROIP-24-2-PDF”

³³ See: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document

³⁴ While conventions are legally binding once ratified by states, not all international instruments are conventions. One example: the United Nations Declaration on the Rights of Indigenous Peoples of 2007 is a declaration, not a convention. Even as it is highly influential and widely regarded as a significant document in the field of indigenous rights, it is not legally binding under international law. Further, the extent to which even conventions are implemented and enforced varies significantly among countries. Ratification does not, in all cases, translate to full and effective implementation. A second example: as of 2024, only 24 countries have ratified the legally binding Indigenous and Tribal Peoples Convention no. 169 (ILO 169). The United States, Canada, and Russia, among many countries with significant indigenous populations, have not ratified it. Further, extent of implementation varies even among ratifying countries. In South America, for example, Brazil and Peru ratified ILO 169 but confront significant challenges in fully implementing provisions especially regarding land rights and consultation processes. A third example: while the International Covenant on Civil and Political Rights (ICCPR) legally binds ratifying countries, many countries have entered reservations or interpretive declarations that limit their obligations. Some interpret the rights to self-determination and cultural preservation in ways that do not fully align with indigenous peoples' expectations. The Human Rights Committee, which oversees the implementation of the ICCPR, issues recommendations and observations, yet these are not legally binding. In short, the effectiveness and binding nature of international instruments depend on the specific legal, political, and social contexts of each state.

How might international instruments contribute to the project for indigenous rights today? Imagine international law that made the enjoyment of state sovereignty and national territorial integrity contingent on the state's protection of indigenous peoples in its territory from ethnic cleansing or genocide. Further, imagine international law that specified: if the nation state commits either act against an indigenous group, or if a state is unable to prevent other forces (religious or political, for example) from committing such acts, then an indigenous human right to external self-determination –that is, to secession– becomes more than plausible. Such international law does not exist today (Barelli 2011, 414-415).

I propose a profound cultural revision in the ways that indigenous peoples are constructed as the passive addresses of elite international legal instruments. It might begin with some of the ways in which the West, including Vitoria, framed some indigenous peoples 500 years ago. Replacing human-nature-essentialism with human nature understood as a social construct provides indigenous peoples the opportunity to assert their own human nature and to reject the inferior moral status assigned them by Vitoria's lecture. Replacing human-rights-essentialism with the notion of human rights as a social construct provides each indigenous people the opportunity to author its own human rights and to reject its exclusion from human rights, for example in Vitoria's lecture. These replacements can liberate the cosmopolitan potential inherent in Vitoria's understanding of the humanity of the Amerindians. Doing so can contribute to a needed rethinking of international law today.

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